Supreme Court, U. S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1191

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF ALBUQUERQUE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

CITATIONS

Cases:

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CITY OF ALBUQUERQUE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–13A) is reported at 545 F. 2d 110. The opinion of the district court (App. B, *infra*, pp. 14A–39A) is not officially reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 40A) was entered on November 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer's duty, under Title VII of the Civil Rights Act of 1964, as amended, reasonably to accommodate an employee's bona fide religious prac-

tice of refraining from work on his Sabbath requires the employer to provide reasonable assistance to the employee in finding a substitute to work on his Sabbath.

STATUTES AND REGULATIONS INVOLVED

Section 703 of the Civil Rights Act of 1964, 78 Stat. 255, as amended (42 U.S.C. 2000e–2), provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Section 701 of the Civil Rights Act of 1964, 78 Stat. 253, as amended (42 U.S.C. (Supp. V) 2000e), provides in pertinent part:

For the purposes of this subchapter—

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions * * *.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees * * *.
>
> * * * * *
>
> (h) The term "industry affecting commerce" * * * includes any governmental industry, business, or activity.
>
> * * * * *

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The 1967 EEOC Guidelines on Discrimination Because of Religion (29 C.F.R. 1605.1) provide in pertinent part:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

STATEMENT

On October 31, 1972, Salomon Zamora was dismissed from the Albuquerque Fire Department. In November 1973, the United States filed suit on Zamora's behalf in the district court, alleging that his dismissal was the result of the fire department's failure reasonably to accommodate Zamora's religious needs, as required by 42 U.S.C. 2000e(j). An order entered on August 12, 1974, dismissing the action for lack of jurisdiction was vacated, upon timely motion, on September 14, 1974; and the case was tried to the court on October 31 and November 1, 1974. The evidence adduced at trial showed the following undisputed facts (App., *infra,* pp. 21A–33A).

Zamora was hired as a fireman by the Albuquerque Fire Department in March 1969. At that time he had temporarily left the Seventh Day Adventist Church. Since September 1971, however, he has been a member of and sincere believer in that church. Its tenets require Zamora to abstain from all but emergency work on the Sabbath, which extends from sunset on Friday to sunset on Saturday (App., *infra,* p. 22A).

The Albuquerque Fire Department had about 350 employees, 180 of whom were of Zamora's rank (fireman). Firemen in Zamora's division work a 56–hour week divided into a nine–day rotation consisting of 3 day shifts (8:00 a.m. to 6:00 p.m.) followed by 3 night shifts (6:00 p.m. to 8:00 a.m.) and 3 days off. This schedule required Zamora to work approximately 35 Friday night or Saturday day shifts a year. From December 1971 through August 1972, Zamora primarily used sick leave to avoid working on the Sabbath.

In early September 1972, he was told that this was an improper use of sick leave and he discussed with his chief other possible alternatives to his working on the Sabbath. Zamora's request to be officially excused from working on the Sabbath was denied. The department simply required him to attempt to work out his problem within the existing departmental regulations, which allowed Zamora to avoid working on the Sabbath only through using vacation leave or leave without pay, or by trading shifts with another fireman (App., *infra,* pp. 23A, 25A–26A, 27A–28A, 29A–30A).

On October 9, 1972, Zamora submitted a request for vacation leave on October 28, a Saturday. The department denied this request, stating that the division was at the minimum acceptable manpower. Although Zamora found it difficult to trade shifts to avoid working on his Sabbath (App., *infra,* pp. 30A, 31A–32A), his superior would not help him to arrange such a trade for this or any other day (Tr. 361–362, 372–373).

When Zamora informed departmental officials that he would not work on the Sabbath and when he did not report on the 28th, the chief informed him that he was recommending Zamora's dismissal. On October 31, Zamora was dismissed for insubordination—specifically, for having refused to work on October 28, his Sabbath (App., *infra,* pp. 30A–31A, 32A).

Relying heavily on the "close analogy" between Zamora's position and that of the complainant in *Hardison* v. *Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo.), reversed, 527 F. 2d 33 (C.A. 8), certiorari granted, November 15, 1976, No. 75–1126, the district court concluded that the Albuquerque Fire Department had complied with the requirements of Title VII

(42 U.S.C. (Supp. V) 2000e(j)) and the implementing guidelines (29 C.F.R. 1605.1). While recognizing that Zamora might at times have been unable to avoid having to work on his Sabbath under the department's regulations, the trial court nonetheless determined that the accommodations made by the fire department were reasonable, that for the department to assist Zamora in obtaining trades of shifts was unnecessary, and that to rearrange schedules to permit Zamora to be off on his Sabbath would have imposed undue hardship on the department (App., *infra,* pp. 35A–36A, 38A).

On appeal, the United States contended that: (1) the fire department had a duty reasonably to assist Zamora in providing substitutes for his scheduled Sabbath shift, unless the department could show that such assistance would result in undue hardship; and (2) the district court's finding that providing assistance to Zamora might require the fire department to bear some financial burden, compel other firemen to work more frequently the less desirable Saturday shift, or impose complex scheduling problems does not constitute "undue hardship" within the meaning of 42 U.S.C. (Supp. V) 2000e(j) and 29 C.F.R. 1605.1. The court of appeals, recognizing that "the courts have not been in accord in their thinking on the subject," held that the district court's conclusions as to "undue hardship" and "reasonable accommodation" were "essentially findings of fact" which were not clearly erroneous and affirmed the judgment (App., *infra,* pp. 12A, 13A).

REASONS FOR GRANTING THE WRIT

There is a conflict among the circuits on whether Title VII of the Civil Rights Act of 1964 requires employers reasonably to assist an employee whose bona fide religious beliefs preclude his working on his Sabbath in finding substitutes to work on that day. This Court has so recognized by granting certiorari in *Hardison* v. *Trans World Airlines,* No. 75–1126. Since the decision below conflicts with the court of appeals' decision in *Hardison,* the present petition should be held pending the Court's decision in *Hardison.*

1. The district court here relied heavily on the similarity between the facts of the instant case and those involved in *Hardison* v. *Trans World Airlines,* 375 F. Supp. 877 (W.D. Mo.), and applied the law as it was applied earlier by the district court in *Hardison.* The court of appeals in the instant case affirmed the trial court's "factual determination" that: (1) bearing the financial burden of paying another fireman overtime pay, (2) compelling or requesting another fireman to trade shifts, or (3) having to rework its predetermined schedule, would have constituted "undue hardship" for the fire department not mandated by 42 U.S.C. (Supp. V) 2000e(j) and 29 C.F.R. 1605.1. When the "closely analogous" *Hardison* case was appealed, the Eighth Circuit reached the opposite result. *Hardison* v. *Trans World Airlines,* 527 F. 2d 33 (C.A. 8), certiorari granted, November 15, 1976, No. 75–1126. In reversing the decision relied upon by the district court in the instant case, the Eighth Circuit concluded that: (1) the statutory obligation reasonably to accommodate an employee's religious needs may require that some cost be borne by the employer; (2) the

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employer has an affirmative obligation at least to seek to find substitutes for the Sabbatarian; and (3) accommodation to an employee's religious needs is not an undue hardship on the employer merely because it might irritate other employees. The two courts of appeals thus have adopted conflicting legal standards to govern essentially similar factual situations.

Also in conflict with the decision below are the decisions in *Cummins v. Parker Seal Co.*, 516 F. 2d 544 (C.A. 6), affirmed by an equally divided Court, No. 75–478, decided November 2, 1976, and in *Riley* v. *Bendix Corp.*, 464 F. 2d 1113 (C.A. 5). In reversing the district court's judgment, the Sixth Circuit in *Cummins* held that the mere fact that Saturday Sabbath observance by one employee requires other employees to substitute during weekend hours does not demonstrate an undue hardship on the employer's business. Similarly, in *Riley* v. *Bendix Corp.*, the Fifth Circuit, in reversing the district court's finding of compliance with 42 U.S.C. 2000e, specifically referred to the employer's failure to arrange for another person to substitute for the employee who would not work during his Sabbath. 464 F. 2d at 1115.

The court of appeals below relied for support on *Reid* v. *Memphis Publishing Co.*, 521 F. 2d 512 (C.A. 6), certiorari denied, November 15, 1976, No. 75–1105, and *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324 (C.A. 6), affirmed by an equally divided Court, 402 U.S. 689. However, the Sixth Circuit in *Reid* declared that it was applying to that case the law as it existed prior to the amendments. And it was the

decision in *Dewey* that precipitated the enactment by Congress in 1972 of 42 U.S.C. (Supp. V), 2000e(j), which requires an employer to make reasonable accommodations to the employee's religious needs.

The courts of appeals in both *Cummins* and *Hardison* held, correctly in our view, that 29 C.F.R. 1605.1 applies to acts occurring prior to the 1972 amendments to Title VII. The court of appeals in *Reid*, however, took the view, and petitioner T.W.A. in *Hardison* contends, that the 1972 amendments altered, rather than ratified, the prior effect of the Act. If this Court agrees with the court of appeals in *Hardison* on this point, its decision in *Hardison* may well control the present case, which involves conduct occurring after the 1972 amendments. Action on the present petition, therefore, should be deferred pending the Court's decision in *Hardison*.

2. Here, in contrast to *Hardison*, the challenged employer is a government agency. In the 1972 amendments Congress sought, among other things, to impose the same obligations on all covered employers, private, state and local, and federal. *Chandler* v. *Roudebush*, 425 U.S. 840; *Morton* v. *Mancari*, 417 U.S. 535. In the context of public employment, however, the employee's statutory rights draw additional support from the requirements of the Free Exercise Clause of the First Amendment, as incorporated into the Fourteenth Amendment. This Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398, established the principle that a State may—and in some cases must—exempt from the operation of a facially neutral condition or requirement

(such as Saturday work) persons whose sincere religious beliefs or practices would be burdened by its application to them. See, also, *Braunfeld* v. *Brown*, 366 U.S. 599; *Wisconsin* v. *Yoder*, 406 U.S. 205, 234–235, n. 22. Because of this additional dimension in the present case, the Court's decision in *Hardison* may not be controlling here.

CONCLUSION

Consideration of the present petition should be deferred pending this Court's decision in *Hardison*.

Respectfully submitted.

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FEBRUARY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75–1557

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CITY OF ALBUQUERQUE, et al., Defendants-Appellees.	Appeal from the United States District Court for the District of New Mexico (D.C. Civ. A., No. 10442)

[decided November 29, 1976]

Before MCWILLIAMS and BREITENSTEIN, Circuit Judges, and ZIRPOLI*, District Judge.

MCWILLIAMS, Circuit Judge.

This is an action brought by the United States against the City of Albuquerque and its fire chief for alleged religious discrimination in its employment practices within the city fire department, in violation of 42 U.S.C. § 2000e–2. One Salomon Zamora, a fireman first class in the Albuquerque fire department, was discharged after he (Zamora) failed to report for work on the day shift for Saturday, October 28, 1972. Zamora, a Seventh Day Adventist, had refused to appear for work on October 28, 1972, because such, in his view, would have violated one of the practices of

* Of the Southern District of New York, sitting by designation.

his particular religion which forbade working on the Sabbath, except for emergencies. The Sabbath as observed by the Seventh Day Adventists is from sundown Friday until sundown Saturday. By answer the City of Albuquerque admitted Zamora's discharge but denied that such discharge resulted from any discrimination against Zamora.

The Honorable Edmund L. Palmieri, Senior Judge for the Southern District of New York, sitting by designation in the United States District Court for the District of New Mexico, heard the case and after a two-day trial found in favor of the City of Albuquerque and dismissed the action. The trial judge's memorandum opinion was elaborate and in great detail, containing a preliminary statement, 69 findings of fact and 17 conclusions of law. That opinion is now reported at 9 Employment Practices Decisions ¶10,182 and the reader is referred to that opinion for the background facts out of which the present controversy arises. Such background material will be developed in the present opinion only insofar as is necessary to an understanding of our disposition of the matter.

We are here concerned with two sections of the Civil Rights Act of 1964, as amended, namely 42 U.S.C. § 2000e–2 and 42 U.S.C. § 2000e(j). The former section reads in pertinent part as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

> compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Section 2000e(j) provides as follows:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is *unable to reasonably accommodate* to an employee's or prospective employee's religious observance or practice *without undue hardship* on the conduct of the employer's business. (Emphasis added.)

In his memorandum opinion the trial judge commented that there was ample evidence to indicate that the real reason Zamora was discharged was his own "intransigence" and that he had not been discharged because of his religion. However, the trial judge did not rest his decision on that ground and proceeded to apply to the factual situation then before him the provisions of 42 U.S.C. § 2000e(j). In this regard the trial court found that the City of Albuquerque made reasonable accommodations to Zamora's religious practices and that further and additional accommodation would have resulted in an undue hardship on the business of the fire department. In our view these findings are not clearly erroneous and it is on this basis that we affirm. Fed.R.Civ.P. 52(a). Upon review of the record we cannot say with a definite and firm conclusion that a "mistake" was committed by the trial court. United States v. United States Gypsum Co., 333 U.S. 364 (1948). The issues before the trial court were not ones

which were open and shut, but on the contrary were ones upon which reasonable minds could well differ. In such circumstance the trial court's findings should stand. Brief reference to the facts will put the matter in focus.

Zamora joined the Seventh Day Adventist Christian Church in 1961. In 1968 Zamora and his wife were divorced, and he was disfellowshipped from his church. In March 1969 Zamora became a member of the Albuquerque Fire Department. At the time of his employment Zamora was not a member of the Seventh Day Adventists, and he indicated in his application that he could work any day of the week, and apparently did work whichever shift he was called on until around September 1971. At this time Zamora remarried his former wife and he thereafter rejoined his church.

As indicated above, one tenet of the Seventh Day Adventist is that he observe the Sabbath Day, which commences at sundown on Friday and ends at sundown on Saturday. "Observe" means to refrain from unnecessary work on the Sabbath, although a Seventh Day Adventist may engage in so-called "emergency" work on that day. Just what constitutes "emergency" work is apparently a matter between the member and his God. However, the present case does not turn on this distinction between unnecessary work and emergency work.

Zamora, a fireman first class, was assigned to Division 1 of the Fire Suppression Department, which works on a 56-hour work week. The day shift is from 8:00 a.m. to 6:00 p.m., and the night shift is from 6:00 p.m. to 8:00 a.m. The work force at Division 1

is divided into three platoons: A, B, and C, which rotate on the basis of working three consecutive day shifts, next working three night shifts, and then having three days off. Consequently, no fireman has the same days off each week, since a nine-day work cycle is imposed on a seven-day week.

On the work schedule outlined above, Zamora would be called on to work either the Friday night shift or the Saturday day shift some 35 times in a year. A minor problem did arise in connection with the Friday day shift, since in winter the sun would set before the end of the Friday day shift, i.e. 6:00 p.m. Similar problems arose in summer when sundown did not occur until sometime after the Saturday night shift commenced. However, there was no particular problem in this connection as Zamora, with the apparent approval of his superior, was in each instance, though on duty, not required to perform so-called menial work after sundown on Friday, nor before sundown on Saturday. The present controversy, then, stems from those occasions when Zamora was called on to work either the Friday night shift or the Saturday day shift.

From October 1971 until October 1972, Zamora used sick leave some 13 times in order to avoid working Friday nights or Saturday days. During this period he also took annual leave several times and he traded shifts once in order to avoid work on his Sabbath. However, in early September 1972, the matter of Zamora's not working on Friday nights or Saturday days became a subject of dialogue between Zamora and his supervisors in the fire department. Whether Zamora himself brought up the question, or whether

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the matter surfaced when Zamora, after taking sick leave, was not found at his home, but in church one Saturday morning, is not really material. In any event both Zamora and his supervisor, after discussion, agreed that it was a misuse of sick leave to take sick leave, when he was not in fact ill, in order to avoid working Friday nights and Saturday days.

On October 9, 1972, Zamora submitted a request for unscheduled vacation leave for the day shift on Saturday, October 28, 1972. On October 23, 1972, this request was denied, the assigned reason therefor being that if the request were granted, District 1 would be undermanned on that particular date. Two other firemen and a lieutenant, who, prior to Zamora, had similarly applied for unscheduled vacation, were also denied leave for the same reason. However, these men obtained time off on October 28, 1972, by trading shifts. Zamora's request for unscheduled leave on October 28, 1972, was kept open, even though denied on the 23rd, in order to allow the request to still be granted if a vacancy occurred. However, none developed and on October 27, 1972, at approximately 5:30 p.m. he was formally notified that his request for unscheduled leave for October 28, 1972, had been finally denied. Zamora at that time informed his superior that he would not report for work on October 28, 1972, and he did not. Thereafter Zamora was suspended and eventually he was discharged for such absence. Prior to the actual discharge there was discussion back and forth between Zamora and the fire chief, with the latter urging Zamora to reconsider and try to work it out within the rules and regulations of the department.

Zamora remained adamant and his formal discharge followed.

As indicated above, the trial judge found that the City of Albuquerque had attempted to make reasonable accommodations to Zamora's religious practices and that such reasonable accommodations were in fact embodied in the rules and regulations of the fire department. In this regard there was a rules committee in the City's fire department, which consisted of one member from each rank in the department, which committee worked in conjunction with the fire chief. If the committee and the chief agreed on a rule or regulation, it was adopted. In the case of a disagreement between the committee and the chief, the matter was referred to a personnel director, who was the final authority.

Under the rules and regulations of the Albuquerque Fire Department there were three ways in getting time off, i.e., not having to work an assigned shift. These were using a day of one's vacation leave, taking leave without pay, and trading shifts with another fireman of the same rank. There were some minor restrictions on getting time off. For example, there was a minimum manning level and if a request for time off would mean going below that level, the request would be denied. But on the whole, the trial court found, and we agree, that the fire department had a fairly liberal time off policy, both in actual practice and as concerns the rules and regulations themselves. It is true that Zamora testified that he had never had much luck in trading shifts with other firemen. His testimony, however, was countered by several firemen

who testified as defense witnesses that they also worked in Division 1 and that they frequently traded shifts, and would have traded with Zamora, but that they were never asked. In this latter regard the record indicates that for some reason Zamora was indeed reluctant to ask others to trade shifts and his ultimate position, as well as that of counsel in this appeal, is that it was up to his supervisor to take the initiative and find another fireman for him who would trade shifts. For understandable reasons, the policy within the department was for the firemen to arrange their own trade-offs, as the supervisors did not want to be in the position of coercing trade-offs.

The record also indicates, as above referred to, that Zamora's supervisors were quite reluctant to be forced into the position where Zamora would inevitably be discharged for insubordination, i.e., refusing to report for work when ordered. Zamora was constantly urged by his supervisors to "work it out" within the existing rules of the department, even after he failed to report for work on October 28, 1972. And it was in this general setting that Zamora became "intransigent," as the trial court characterized it, and demanded that he never be required to work on a Friday night shift or a Saturday day shift. His supervisors stated that under the existing rules and regulations they could not give in to this demand and when he then refused to report for work on October 28, 1972, discharge followed.

Did the City of Albuquerque and its fire department demonstrate that they had, through their rules and regulations, made reasonable efforts to accommodate Zamora's religious practices and that further accommodation would result in undue hardship? The trial court found and concluded that such had been "convincingly demonstrated." We think such finds support in the record.

In Williams v. Southern Union Gas Co., 529 F.2d 483, 489 (10th Cir.), *cert. denied*, 45 U.S.L.W 3361 (U.S. Nov. 16, 1976) (No. 75–1511), we stated that the phrases "reasonably accommodate" and "undue hardship" as used in 42 U.S.C. § 2000e(j) are relative terms and cannot be given any hard and fast meaning. Each case necessarily depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer has acted reasonably. Here the employer did not stubbornly insist that Zamora work on his Sabbath, come what may. On the contrary, as a result of interaction between the fire chief and the rules committee, made up of representatives of the firemen, rules and regulations were promulgated which granted a fireman considerable latitude in getting excused from reporting for work for a particular shift assignment. A fireman could use up a portion of his leave with pay, if he be so inclined. Or he could simply take leave without pay. When an employee for personal reasons simply prefers not to work on a given day, it is not too much to suggest that he receive no pay for the shift he does not work. And, perhaps most importantly, firemen were permitted to trade shifts with other firemen of the same grade. Trading shifts was a prevalent practice, even though Zamora was himself not particularly interested in trading shifts with others. By trading shifts, a fireman would of course suffer no loss in pay. But Zamora

would have none of this. He wanted Friday nights and Saturday days off as a matter of right. We conclude that the trial court's finding that the City of Albuquerque made reasonable accommodation efforts is not clearly erroneous and should not be overturned by us.

The trial court also concluded that if the City made further efforts to accommodate Zamora there would be "undue hardship" on the "business." The "business" was that of fire suppression, and such is obviously a matter of great public interest. In our view when the "business" of an employer is protecting the lives and property of a dependent citizenry, courts should go slow in restructuring his employment practices. Harper v. Mayor and City Council of Baltimore, 359 F.Supp. 1187, 1205 (D.C. Md.), *modified on other grounds sub nom.* Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973).

But beyond its rules and regulations, just what could the City have done to accommodate Zamora's religious practices? The City of course could have given in and set up a schedule that would never have called on Zamora to work any Friday night or Saturday day shift. Counsel says such might have "inconvenienced" the City, but would not have really amounted to "undue hardship." However, the trial court concluded that such scheduling to fit Zamora's demands would have amounted to undue hardship. The trial court's pertinent conclusions on this particular matter are worthy of note and read as follows:

> 9. Further accommodation, as suggested by the United States, would impose an undue hardship on the Albuquerque Fire Department in any of several ways: by inflicting an unjustified financial burden upon it; by compelling other firemen to accept less favorable working conditions; by forcing a reduction in the Defendant Department's fire fighting efficiency; by imposing onerous and complex scheduling problems upon it.

> 12. A blanket grant of Sabbaths off or substituting Sunday duty would still leave Zamora's scheduled Sabbath shift undermanned. An extra fireman might have been required either from another station, possibly leaving that station short-handed, or from among firemen not scheduled for duty—causing someone to work overtime at premium wages and possibly requiring the replacement to work 38 or 34 hours straight. . . ."
>
> 13. . . . One indication of whether such an accommodation can reasonably be made or whether it will work such a hardship is whether the employer has been or is now willing to make such accommodations for other employees similar to that which the Plaintiff demands. . . . The Fire Department of the City of Albuquerque has never allowed firemen to be absent from duty except by the regularly provided procedures. . . .
>
> 14. The serious public life-saving and property protecting nature of the Department's function and the strict manning and budgetary limits under which it operated prevented

the Department from allowing the firemen off upon demand or reshuffling schedules made up in advance on a six month basis in order to avoid scheduling one employee on Fridays and Saturdays, especially in a situation in which all employees are scheduled on a rotating three day shift....

15. If the Albuquerque Fire Department falls below manning requirements, the obvious result is a greatly magnified risk to the citizens of the City of Albuquerque of loss of life and destruction of property, as well as an increased risk of harm to the firemen themselves. The cost of accommodating any vacancies in the established work schedule must be met from public funds. Therefore, any further accommodation by the Fire Department to Solomon Zamora's demands would have been in excess of the accommodation contemplated by Congress and would have constituted an undue hardship.

We regard the trial court's several conclusions as to "undue hardship," as well as its earlier determination of "reasonable accommodation," to be essentially findings of fact. On review such should be accepted unless they be deemed clearly erroneous. In our review such are not clearly erroneous and hence should be upheld.

In arguing for reversal and the entry of a judgment in favor of Zamora, counsel relies on such cases as Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Hardison v. Trans World Airlines, Inc.,

527 F.2d 33 (8th Cir. 1975), *cert. granted*, 45 U.S.L.W. 3359 (U.S. Nov. 16, 1976) (No. 75–1126); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court*, 45 U.S.L.W. 4009 (U.S. Nov. 2, 1976) (No. 75–478); Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972); and Riley v. Bendix Corp., 464 F.2d 113 (5th Cir. 1972). We recognize that the problems arising from the fact that Seventh Day Adventists are forbidden to work on Saturdays are troublesome ones and that the courts have not been in accord in their thinking on the subject. For cases holding that the employer had made reasonable accommodation efforts to Seventh Day Adventists, and upholding their discharge upon a refusal to work on Saturdays, see Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 16, 1976) (No. 75–1511); Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied*, 45 U.S.L.W. 3361 (U.S. Nov. 16, 1976) (No. 75–1105); and Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971).

A reading of all these cases leads us to conclude that to a very great degree each case turns on its own particular facts and circumstances. Under the facts and circumstances here present, if we reversed the trial court we would simply be substituting our best judgment of the facts for that of the trial court. This we should not do. Indeed we cannot. Williams v. Southern Union Gas Co., supra.

Judgment affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

against

CITY OF ALBUQUERQUE, a Municipal Corporation; RAY KUHN, Chief, City of Albuquerque Fire Department and ARTHUR MARTINEZ, Chief, City of Albuquerque Fire Department,

Defendants.

No. 10442 Civil

[Filed April 30, 1975]

PALMIERI, District Judge*

PRELIMINARY STATEMENT

This action was brought by the Government pursuant to 42 U.S.C. § 2000e–5(f) and 28 U.S.C. § 1345 to enforce the provisions of Title XII Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*), on behalf of Salomon Zamora, a fireman employed by the City of Albuquerque. In 1971, two years after his employment, Zamora rejoined the Seventh Day Adventist Church of which he had previously been a member, thereby embracing a Sabbath observance from sundown Friday to sundown Saturday.

Zamora was assigned to one of three fire fighting districts, each having a geographical area and consisting of several engine and ladder companies. Each dis-

* Of the Northern District of California, sitting by designation.

trict was manned by three platoons of firemen rotating on a fifty-six hour work schedule, so that two platoons would be on duty during any one day, on a day shift from eight to six, and on the night shift from six until eight the next morning. The platoons rotated, so that each had three day shifts, three night shifts and three off. In consequence, days off changed because of the rotation of platoons and no fireman ever had the same days off.

There can be no question that firemen seeking time off when they were otherwise scheduled to work had the benefit of as flexible a system of regulations as could be expected under the circumstances. The nature and scope of these regulations are well stated in the introductory portion which reads as follows:

> These rules cannot, nor are they expected to provide a solution to every question or problem which may arise in an organization established to render emergency service. It is expected, however, that they will be sufficiently comprehensive to cover either in a specific or general way, the obligations and duties of the members of the Albuquerque Fire Department.
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> They are not designed, nor intended, to limit any member in the exercise of his judgment, or initiative in taking the action a reasonable person would take in extraordinary situations. Much, by necessity, must be left to the loyalty, integrity, and discretion of members. To the degree which the individual member

> demonstrates possession of these qualities in the conscientious discharge of his duty, and to that degree alone will the Department measure up to the high standard required of the service.

These regulations included unscheduled vacation, scheduled vacation, leave without pay and, most importantly, full or partial shift trading—a written agreement between two firemen to trade full or partial shifts—routinely approved in each instance by superior officers except when exigent circumstances intervened. These regulations were frequently availed of and were sufficient to permit attendance at weddings, baptisms, religious retreats, university classes and playing in a dance orchestra.

Zamora had sufficient seniority in 1971 to take a merit examination for promotion to the Fire Prevention Bureau of the Fire Department. He chose not to take it even though such promotion would have placed him in a position to avoid any Sabbath conflicts because no weekend work would have been required.

Between September, 1971, when Zamora rejoined the Seventh Day Adventist Church, and his ultimate separation from service with the Albuquerque Fire Department in October, 1972, Zamora sought ways to avoid working on his Sabbath when his work shift conflicted with it. On some occasions he reported for duty notwithstanding the conflict. On at least fourteen occasions he falsely claimed sick leave contrary to regulations and despite exposure to disciplinary action. In August 1972 a Friday-Saturday pattern was dis-

covered with respect to Zamora's sick leaves by a high ranking superior officer, District Chief Lujan. When Lujan checked Zamora's whereabouts with respect to a Saturday sick leave and discovered he was at church Zamora was advised to produce a note from a physician for any future weekend sick leave. No disciplinary action was taken. In connection with another sick leave on September 23, 1972, Zamora produced a note from a physician who was a fellow church member to the effect that he had been "seen professionally." Zamora concededly was not really sick. On the occasion in August when Chief Lujan first inquired into Zamora's use of Friday-Saturday sick leave, Lujan visited with Zamora and his wife at Zamora's home and explained the various options Zamora could exercise with propriety in order to avoid any conflict with his Sabbath observance. Zamora took the position that he needed to be excused on all Saturdays and rejected the available options as insufficient. Thereupon Lujan referred him to the highest ranking officer, the Chief of the Fire Department, Ray Kuhn, a veteran fireman who had moved to his position over a period of thirty-two years of service. The meeting between Zamora and Kuhn, which took place in early September 1972 covered pretty much the same ground as that between Zamora and Lujan. Chief Kuhn discussed the entire problem and explained three methods of getting time off—trading of shifts, vacation leave and leave without pay. Zamora remained adamant and insisted, as he had with District Chief Lujan, that he be given the Sabbath time off on a firm basis and requested that he not be required to work the Friday night shift or the Saturday day shift. It should be noted, parenthetically, that even this implied a further relaxation with respect to two other shifts, the Friday day shift and the Saturday night shift, if they conflicted with the Friday or Saturday sundown requirement.[1] An uneasy peace ensued. Zamora requested and obtained unscheduled vacation leave for three shifts in September 1972 which conflicted with his Sabbath requirements. A further request by Zamora for unscheduled vacation leave for October 28, 1972, was denied because his district would be at minimum strength. Two firemen and a lieutenant who had made prior similar requests were refused for the same reason. Although these men succeeded in obtaining the time off by trading shifts, Zamora did not seek to do so and indeed rejected a suggestion that he do so. In point of fact, Zamora traded shifts only once during his career as a fireman. He never pursued diligently the shift-trading method of avoiding conflicts. Zamora advised two superior officers, one of them District Chief Lujan, that he would not report for duty on October 28, 1972, because of his Sabbath observance. Zamora remained absent despite his awareness that he was placing himself in jeopardy of disciplinary action. His suspension followed. On October 29th District Chief Lujan went to Zamora's home to advise him he was being recommended for dismissal for insubordination in failing to report for duty as scheduled. On October 30, 1972, Zamora had a lengthy meeting with Chief Kuhn at which two religious ad-

[1] Since the shifts change at 6:00 P.M., the Sabbath would conflict with the Saturday night shift in the summer and the Friday day shift in the winter.

visers were present and again the regulations were discussed as a means of accommodating Zamora. Chief Kuhn offered to remove the suspension in an effort to persuade Zamora to avail himself of the available methods for obtaining time off. But Zamora remained adamant and refused to accept anything less than a firm commitment by the Fire Department that he would never be required to work on his Sabbath. Zamora's religious beliefs did not require such a commitment. He could have remained available for emergency work, and omitted only menial work, thus accomplishing one accommodation which he had on occasion been permitted to use in the past for part of a shift. Furthermore, he could have sought with greater diligence to use the methods available to him by regulation to avoid or attenuate the conflicts with his Sabbath.

The taking of an inflexible position by Zamora left those responsible for the operation of the Fire Department with a demand they could not meet. It could be likened to that of an Army Commander compelled to go to battle knowing that one or more of his soldiers would refuse to obey orders during a given twenty-four hour period. Under such circumstances the Fire Department would be forsaking its heavy responsibilities fraught with serious risk to the life and property of the City's citizens as well as to its own personnel and equipment. It is impractical to suggest, as the Government appears to do in Zamora's behalf, that an exception should have been made for Zamora because he was one of many. In the highly sensitive area with which we are dealing, the presence or absence of one trained member in an emergency can mean the difference

between the operation or non-operation of a piece of equipment and the difference between life and death. It is not fanciful to foresee a series of serious fires or other catastrophes with or without injuries to its personnel or epidemics of disease among the firemen which would compel the Fire Department to place its fire fighting personnel on an emergency footing requiring long hours of duty. In such situations the kind of commitment Zamora demanded would be utterly impossible of fulfillment.

Zamora's dismissal resulted from his adoption of an intransigent position. He was not dismissed because of his religious beliefs but because of his insubordination in failing to obey a direct order to report for work. Zamora's insubordination resulted from the Fire Department's failure to accommodate him on his own terms with respect to his Sabbath observance requirements. Zamora was not told by anyone in authority that his dismissal was ordered because of his religious beliefs. Zamora's testimony to the contrary is rejected by the Court as unpersuasive and inconsistent with the surrounding circumstances. In all their dealings with Zamora the officers of the Albuquerque Fire Department treated him fairly and considerately and with a compassionate regard for his religious beliefs.

Attempts were made by other city officials to find Zamora alternative employment with the city. These efforts proved unsuccessful. Zamora failed to meet with the City Personnel Director John Martinez, although personally requested to do so, and possible job opportunities which might have suited Zamora were lost

during the next six months because Zamora moved and remained unavailable.

In light of what has been said the Court cannot conclude that Zamora was dismissed, as he claims, because of his religious observance of the Sabbath. While religious considerations did constitute a basis for Zamora's motivations, there is ample evidence to support the conclusion that it was Zamora's intransigence and not his Sabbath observance which led to his dismissal. This threshold issue is not ruled upon as dispositive, however, since we are persuaded that the Albuquerque Fire Department attempted to make reasonable accommodations to Zamora's religious requirements; and further, that any further accommodations would have worked an undue hardship on the functions and business of the Fire Department. 42 U.S.C. § 2000 e(j). We prefer to base our holding on these grounds.

The findings of fact and conclusions of law which follow are intended to amplify and supplement what has already been said, and to demonstrate that the case should be dismissed.

FINDINGS OF FACT

1. This action was brought by the United States of America on behalf of Salomon Zamora, a fireman employed by the City of Albuquerque.

2. Defendant, City of Albuquerque, is a municipal corporation, incorporated under the laws of the State of New Mexico.

3. The Albuquerque Fire Department is operated by the City of Albuquerque to prevent and suppress fires within the city limits.

4. Ray Kuhn was Chief of the Albuquerque Fire Department from September 1, 1968, until his retirement, July 16, 1974.

5. Arthur Martinez became Chief of the Albuquerque Fire Department July 16, 1974, and was acting in that capacity at the time of the trial of this action, October 31—November 1, 1974.

6. Salomon Zamora was a member of the Seventh Day Adventist Church from 1961 until 1968. In the summer of 1968 he was divorced from his wife and disfellowshipped (involuntarily removed) from the Church.

7. In March 1969, Salomon Zamora was hired by the Albuquerque Fire Department as a fireman in the Fire Suppression Division.

8. Salomon Zamora remarried his former wife in September 1971, and rejoined the Seventh Day Adventist Church.

9. Salomon Zamora, since his remarriage, sincerely believes in the teachings of the Seventh Day Adventist Church.

10. The Sabbath is observed from sundown Friday to sundown Saturday by Seventh Day Adventists. Church members must refrain from all unnecessary work during the Sabbath. While unnecessary work can be defined as that which can be deferred to another time, the nature of such work escapes precise definition.

11. Emergency work, saving lives or property, and work necessary to prepare for emergency work may be done on the Sabbath.

12. During the period following his remarriage Salomon Zamora sincerely believed that he was violat-

ing his religious obligations by working as a fireman on the Sabbath with respect to the performance of work he considered to be of a non-emergency nature. He did not, however, avail himself of the options allowed by regulation to avoid conflict with his Sabbath observance.

13. The Albuquerque Fire Department is organized in two main divisions: Fire Prevention and Fire Suppression. Additionally, there are Administrative, Training, and Maintenance Divisions.

14. The Fire Prevention Bureau operates on an 8:00 a.m. to 5:00 p.m. schedule, Monday through Friday. It does not function on weekends.

15. A fireman first class with two years of seniority is eligible to take a merit examination for promotion to the Fire Prevention Bureau.

Salomon Zamora became eligible to take this examination on March 4, 1971. An examination for promotion to the Fire Prevention Bureau was given June 1, 1972, but Zamora did not elect to take it.

16. The Fire Suppression Division is maintained on a 24-hour 7-days a week schedule. Individual firemen work 56 hours a week. The day shift is 8:00 a.m. to 6:00 p.m. and the night shift is 6:00 p.m. to 8:00 a.m. Firemen are organized in three platoons, A, B, and C. The platoons work on a rotating schedule: three day shifts, three night shifts, and three days off. Rotation schedules are posted six months in advance.

17. No individual fireman is permanently assigned to a particular shift, or has specific days of the week off.

18. Within the Fire Suppression Division there are

three Districts assigned to three corresponding geographical divisions of the City of Albuquerque. Each District is comprised of several engine and ladder companies.

19. Salomon Zamora was assigned to District One, Engine 10, during the time material to this action.

20. For each piece of equipment (such as a pumper truck or ladder truck), and for each District, there is an established minimum and maximum manning level.

21. Work schedules and manning requirements are set by the Fire Chief and the Rules Committee.

The Rules Committee is made up of one fireman from each of the six ranks: Assistant Chief, District Chief, Captain, Lieutenant, Driver, and Fireman.

22. The minimum manning level reflects in part the decisions of the Fire Chief as to the number of persons necessary to operate a piece of equipment safely and efficiently.

23. Department policy requires equipment below the minimum manning level to be held out of service until the minimum level is obtained.

24. When equipment is below minimum manning, an attempt is made to obtain a replacement from another station or by having another employee (not scheduled on that shift) work overtime. Overtime work involves additional expenditure of public funds and is on a voluntary basis only.

25. While Zamora was with the Fire Department, there was no relief force available to fill vacancies caused by the unauthorized absence of firemen.

26. The maximum manning level is based on the total number of employees in the Albuquerque Fire

Department as authorized by the City of Albuquerque.

27. The absentee rate in the Fire Suppression Division is about 12%, due to illness, vacation, or leave without pay.

28. The difference between the maximum and minimum levels is the number of individuals who would be allowed to be off on a given day.

29. The Albuquerque Fire Department Regulations provide that firemen may obtain time off in four ways: Scheduled vacations, unscheduled vacation, leave without pay, and shift-trading.

30. Salomon Zamora was accruing vacation time at a rate of one shift per month. This could be taken as scheduled or unscheduled vacation.

31. Scheduled vacation is allotted to firemen in January of each year on the basis of seniority within a given rank. Salomon Zamora competed for scheduled vacation with other firemen. A limited number of individuals of each rank are allowed to be on scheduled vacation at the same time.

32. Unscheduled vacation is requested as desired by individuals. Requests are granted on a first-come first-served basis without regard to rank.

33. An individual can also request leave without pay on any day except a holiday. Except in the case of an emergency, such requests are granted without regard to manpower requirements.

34. The Albuquerque Fire Department authorized shift-trading in 1971 to allow employees to obtain time off from scheduled work as they needed it.

35. Shift-trading involves an agreement between two individuals of the same rank to work the other

person's regularly scheduled shift on specified dates. Full or partial shifts may be traded.

36. Shift-trading involves only the individuals seeking to trade, with minimal supervision by the Fire Department administration.

37. Regulations require that: Shifts be repaid within 30 days; only 3 unpaid shifts may be accrued by an individual in one 30-day period, and a holiday shift may not be traded. A requested trade will be denied only if one of these conditions is not met.

38. In repaying a traded shift an individual might have to work 38 hours (night shift, day shift, night shift) or 34 hours (day shift, night shift, day shift) straight.

39. Shift-trading was unpopular with some individuals for this reason. Nevertheless it was availed of quite extensively by the firemen generally.

40. Zamora's Sabbath observance entailed the avoidance of all "unnecessary work" during the Sabbath period. While emergency work could be considered an exception to the "unnecessary work" rule, menial work could not. The distinction between the two is not readily ascertainable with respect to a fireman's duties and in the last analysis it appears to rest upon the conclusions of the individual church member.[2]

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[2] A duly ordained minister of the Seventh Day Adventist Church, Rev. Willmore Duncan Eva, testified as follows:

(p. 134)

Q Now, very briefly, if I give you a sketch of a hypothetical situation, would you tell me what the religious teaching of your church is concerning the Sabbath in this respect. Assume a fireman whose regular routine schedule of work involves him regularly in working on what has been defined as

41. During 1971 and 1972 shift-trading was frequently used by firemen in Fire Suppression to obtain time off for various purposes such as attending school, playing in a band, or attending weddings, baptisms or religious retreats.

42. The Regulations governing methods for obtaining time off were explained to Salomon Zamora before his employment, during his training period and were reviewed during class sessions held regularly at each fire station.

43. Fire Department Regulations are formulated by the Fire Chief and the Rules Committee, acting together.

44. The Sunday routine at the fire stations is more relaxed than on other days. The Training Division does not work on Saturday and Sunday so no classes are held. Buildings are not inspected. Business activity in the community is reduced. The Sunday routine is sometimes called "holiday routine."

45. In December 1971, Salomon Zamora began to use sick leave to avoid working when his scheduled shift conflicted with the Sabbath. This was contrary

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the Sabbath for the Seventh Day Adventist Church, what would the church's view of this kind of work be, this kind of conflict?

A Well, I think if a man were, had not yet been employed by the Fire Department, and was thinking of being employed by the Fire Department, we would probably urge, you know, that he didn't, that he find other employment if at all possible. But if he were already employed by the Fire Department, then became a Seventh Day Adventist or renewed his faith in the Adventist teaching, et cetera, that then he should try his best to work

to the Fire Department Regulations and, to Zamora's knowledge, made him liable to disciplinary action. Salomon Zamora used sick leave for his Sabbath conflicts through August 1972.

46. No disciplinary action was taken against Zamora for his abuse of sick leave.

47. During the summer of 1972, when Zamora worked the Saturday evening shift and sundown came after 6:00, Zamora's station commander allowed Zamora to defer his "household duties" until after sundown. This accommodation was never refused Salomon Zamora when requested.

48. During December 1971 to August 1972 Zamora also used vacation leave three times and traded shifts once in order to have the Sabbath free.

49. District Chief Alfonso Lujan noticed in August 1972 that Zamora's sick leave frequently fell on Friday and Saturday. Chief Lujan visited Zamora's home on August 26, 1972, when he had reported sick, and found that Zamora was not sick and had attended church. Chief Lujan told Zamora that he would have to bring

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out the Sabbath situation, you know, with those involved.

This would be the basic position. We wouldn't, of course, want him to do any kind of unnecessary labor which could be deferred to another time on the Sabbath day. This would be the basic church thinking I suppose.

(pp.135–136)

* * *

Well, you know, initially, what you try to do is not to do any work of any kind. In other words, get the whole of Saturday off from Friday sundown to Saturday evening sundown. If he can get that time off, completely free, this would be the

a note from a physician for any future sick leave on Friday or Saturday.

50. At this meeting Zamora explained to Chief Lujan that he needed to have his Sabbath off. Chief Lujan went over the four methods of obtaining time off under the regulations. He also mentioned the possibility of Zamora transferring to another job with the City or in the Fire Department such as Fire Prevention which would not conflict with the Sabbath. Zamora wanted a firm commitment that he could be off on all Sabbaths. Chief Lujan could not promise this. Lujan referred Zamora to Chief Kuhn, the highest ranking officer of the Fire Department.

51. Zamora did not make his need to have Sabbaths off known to his high ranking superiors until late August 1972. It appears likely that his immediate superiors were aware that some conflict existed and had sought to accommodate him before that time.

52. In early September, Chief Kuhn met with Salomon Zamora to discuss his problem. All the methods provided by the Regulations for obtaining time off were

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ideal. And here again, and I guess this is the issue, really, here again the matter of individual conscience comes in, by all means, and there is some interpretation here that I suppose can look at, but the basic, principally the stand of the church is not to do any work that can be at all deferred to any other time.

Q Would a partial accommodation be in order?

A You mean such as just working some Saturdays?

Q Or just doing some work on Saturdays and not other work involved in the firehouse routine?

A Here again, if the person's individual conscience allowed him to do absolutely emergency work, I don't think that the church would take any strong

discussed in detail with Zamora. Chief Kuhn explained that he could not make the absolute guarantee requested by Salomon Zamora.

53. During September 1972 Zamora accommodated his conflicts using unscheduled vacation three times and once using sick leave.

54. Salomon Zamora requested, on October 9, 1972, unscheduled vacation for October 28, 1972. The request was denied because District 1 would be at minimum manning that day.

Other requests for unscheduled vacation on that date were also denied.

Zamora was informed of the denial on October 23, 1972.

55. The request was kept pending in case a change might allow it to be granted. At about 5:30 on October 27, 1972, Lt. John Milligan called Zamora and told him his request could not be granted.

56. Zamora then told District Chief Lujan he would not appear for work Saturday, October 28, 1972. Lujan asked Zamora to reconsider, but he would not. Lujan then ordered Salomon Zamora to report for work on October 28, 1972.

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action about it, by any means, but again it wouldn't be ideal for the church to do this or for him to do it in the church's views.

* * *

(p. 138)

Q But if one of your parishioners decided that he would draw this distinction between emergency fire calls and menial household station duties, that would be all right with your teaching?

A Here again, I would say again it wouldn't be an ideal and if he were already a member of the

57. Zamora failed to report on October 28, 1972, and was logged as A.W.O.L. He was suspended by Chief Lujan who reported to Chief Kuhn, recommending Zamora's dismissal.

58. Chief Kuhn met with Zamora and Seventh Day Adventist Pastors Hinkle and Laura concerning the suspension on October 30, 1972, when he again explained the four methods available to Zamora to obtain time off. Kuhn said that if Zamora would comply with the Fire Department Regulations, his suspension would be removed. Zamora again expressed his desire for an absolute guarantee of Sabbaths off. Zamora's testimony in this respect is as follows:

> Q. Were you asking Chief Lujan for a guarantee that you would be off on your Sabbath?
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> A. Yes, sir, whenever I was scheduled to work on the Sabbath, that I would be allowed to be off on the Sabbath.
>
> Q. Regardless of manpower or manning restrictions, whatsoever is that correct?
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> A. Yes, sir, I believe so.

59. At the October 30 meeting Zamora said that he

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church, I don't think that he would be disfellowshipped from church membership, but we would certainly counsel him strongly and urge him as we have already said, to get out of the Fire Department, if possible, or to take any recourse that he could to avoid any kind of work at all on Saturday, you know, in the Fire Department.

* * *

(pp. 139–140)

Q Doctor, how do you define menial work?

A This is always difficult, you know, to really come

found shift-trading difficult. He felt that he could not solve his problem working under the Regulations.

60. Salomon Zamora was dismissed for insubordination in refusing a direct order to report to work, and being A.W.O.L. (absent without leave).

61. Zamora met with Chief Kuhn again on October 31, 1972, when he turned in his City equipment. Chief Kuhn had plotted out Zamora's schedule for six months to determine the number of conflicts with the Sabbath. Chief Kuhn found that 14% of Zamora's scheduled full shifts conflicted over a full year. There were also 18 partial conflicts (of less than two hours each) since sundown does not always come at 6:00 when the shifts change. These partial conflicts could have been accommodated as they had on occasion in the past by a dispensation from "menial work" during the requisite brief period of time.

62. Chief Kuhn was justified in believing that Zamora could have arranged to have the Sabbath off by working within the Fire Department Regulations for time off.

63. Zamora requested and obtained a hearing before a Grievance Committee appointed by the City Person-

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to a definition and ultimately, you have to take recourse in the man's own conscience, to what he sees to be menial work and what he sees to be emergency labor.

Q Is it your precept that the man's conscience should determine what is menial and what is not menial?

A No, sir, I think there are certain guidelines the church lays down.

Q Let me give you a hypothetical question. Assume a fireman is stationed in a firehouse and is expecting at any moment to be called to a situation

nel Director, pursuant to the City of Albuquerque Personnel Regulations.

64. The Committee formally recommended that an attempt be made to find Zamora a job with another City department. Zamora's dismissal was upheld.

65. Due principally to difficulties in communicating with him, and partly because of Zamora's employment history and limited skills, no other City employment for Salomon Zamora could be offered to him.

66. Salomon Zamora filed a complaint with the EEOC on October 24, 1972, alleging that he was discriminated against by the Albuquerque Fire Department on account of his religion. The complaint was amended October 31, 1972, to include his discharge. This complaint was unjustified under the circumstances.

67. The EEOC found that an unfair employment practice had occurred apparently because of Zamora's unsupported *ex parte* conclusory statements.

68. On April 26, 1973, the EEOC District Director sent Zamora a letter stating that conciliation attempts had not been successful and that he could obtain a "notice of right to sue" upon request.

69. Suit was filed by the United States on November 15, 1973.

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which may and very often does involve, risk to life and property and let us assume that in order to properly perform his duties, he needs to use certain equipment. The equipment requires a great deal of care for its preservation and maintenance. The care may consist of cleaning; wiping, polishing, greasing, oiling, lifting of heavy loads, the placing of heavy loads and so forth. Would you consider that work menial?

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter in this case pursuant to 28 U.S.C. § 1345 and 42 U.S.C. § 2000e–5(f).

2. The Defendant City of Albuquerque is an employer within the meaning of 42 U.S.C. § 2000e(b).

3. This action was timely filed although more than 180 days had elapsed since Zamora filed his charge with the EEOC, *E.E.O.C. v. Cleveland Mills Co.*, 502 F.2d 153 (4th Cir. 1974).

4. Title VII of the Civil Rights Act forbids an employer "to . . . discharge any individual . . . because of such individual's . . . religion. . . ." 42 U.S.C. § 2000e–2(a)(1).

5. An employer is under an affirmative duty to provide reasonable accommodation to an employee's religious beliefs and observances unless it can show that an undue hardship to its business renders accommodation to the employee's objections unreasonable. 29 C.F.R. § 1605.1; 42 U.S.C. § 2000e(j).

6. Although an employer may not avoid the provisions of Title VII by giving the reason for discharge as insubordination when it is actually on account of the employee's religion, *Shaffield v. Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974), *compare Young v. Southwestern Savings and Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975), this Court is not persuaded that the United States established a prima facie case of religious discrimination against Salomon Zamora. "Employment discrimination based on religion is a serious charge" (dissent of Thornberry, J. in *Young v. Southwestern Savings and Loan Ass'n*,

supra, at p. 146) and should rest on a clearer and more persuasive basis than that offered by Plaintiff here. The Court nevertheless prefers to avoid resting its decision upon this aspect of the case inasmuch as the Defendant Fire Department of the City of Albuquerque has convincingly demonstrated that it made reasonable efforts to accommodate Zamora, and that it could not do more without undue hardship to its operations.

7. Using the methods provided in the Fire Department regulations: vacation (scheduled and unscheduled), leave without pay, and shift-trading, Zamora could have arranged to be off on all Sabbaths he was scheduled to work except perhaps on those coinciding with holidays or with unusual and unforeseeable emergencies and those instances would appear to have been infrequent if they occurred at all.

8. These methods were carefully explained to Zamora on numerous occasions. They were known to Zamora when he obtained employment as a fireman with the defendant department and were reviewed with him by his superiors in an effort to cooperate with him and to accommodate his religious beliefs. Zamora never made full use of the available methods. Instead he confronted the Defendant Fire Department with a demand it could not meet—that it provide Zamora with a work schedule which would provide absolute assurance that no possible conflict with his Sabbath observance would ever arise.

9. Further accommodation, as suggested by the United States, would have imposed an undue hardship on the Albuquerque Fire Department in any of several ways: by inflicting an unjustified financial burden

upon it; by compelling other firemen to accept less favorable working conditions; by forcing a reduction in the Defendant Department's fire fighting efficiency; by imposing onerous and complex scheduling problems upon it.

10. Salomon Zamora could have taken leave without pay on October 28, 1972, rather than remain A.W.O.L. He knew this, and chose not to take leave without pay. An accommodation is not unreasonable because an employee does not like it, or will not avail himself of it. The Albuquerque Fire Department was under no obligation to place Salomon Zamora on leave without pay status against his will.

11. There was no permanent shift to which Salomon Zamora could have been switched to avoid conflicts. The rotating shift feature of the Fire Department serves in part to distinguish other cases holding that employees were discharged unlawfully because of their religion: *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972); *Shaffield v. Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937 (M.D. Ala. 1974); *Claybaugh v. Pacific Northwest Bell Telephone Co.*, 355 F. Supp. 1 (D. Ore. 1973).

12. A blanket grant of Sabbaths off or substituting Sunday duty would still leave Zamora's scheduled Sabbath shift undermanned. An extra fireman might have been required either from another station, possibly leaving that station short-handed, or from among firemen not scheduled for duty—causing someone to work overtime at premium wages and possibly requiring the replacement to work 38 or 34 hours straight. This situation is comparable to one which was found

to create an undue hardship in *Hardison v. Trans World Airlines*, 375 F. Supp. 877 (W.D. Mo. 1974). *See Johnson v. United States Postal Service*, 497 F.2d 128 (5th Cir. 1974). Title VII does not require an employer to impose hardships on its employees, or to bear the financial burden of an employee's religious convictions.

13. An employer is not required to make such accommodations to the religious observances of its employees that will work an undue hardship on the conduct of its business. 42 U.S.C. § 2000e(j). One indication of whether such an accommodation can reasonably be made or whether it will work such a hardship is whether the employer has been or is now able or willing to make such accommodations for other employees similar to that which the Plaintiff demands. *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). The Fire Department of the City of Albuquerque has never allowed firemen to be absent from duty except by the regularly provided procedures, all of which were outlined and made available to Salomon Zamora from the outset of his employment. Defendant City of Albuquerque could not further accommodate Plaintiff's demands without imposing undue impediments to the fulfillment of its fire fighting function.

14. The serious public life-saving and property protecting nature of the Department's function and the strict manning and budgetary limits under which it operated prevented the Department from allowing the firemen off upon demand or reshuffling schedules made up in advance on a six month basis in order to avoid scheduling one employee on Fridays and Saturdays,

especially in a situation in which all employees are scheduled on a rotating three day shift. The case of *Hardison v. Trans World Airlines*, *supra*, suggests some of the limits contemplated by the undue hardship language of the statute. In *Hardison* a private employer, responsible for a passenger airline overhaul facility was held unable to accommodate the religious beliefs of an employee without undue hardship. The complainant, whose work schedule conflicted with his Sabbath observance, occupied a key position in defendant's overhaul facility and leaving that position empty would have impaired the operation of defendant's work, which in turn may have affected the safety of passengers flying in the defendant's airplanes. Filling the position from another area would have deprived that area of manpower, and calling up someone not regularly scheduled for work would have required the payment of premium overtime wages. These facts offer a close analogy with the situation of the Albuquerque Fire Department.

15. If the Albuquerque Fire Department falls below manning requirements, the obvious result is a greatly magnified risk to the citizens of the City of Albuquerque of loss of life and destruction of property, as well as an increased risk of harm to the firemen themselves. The cost of accommodating any vacancies in the established work schedule must be met from public funds. Therefore, any further accommodation by the Fire Department to Salomon Zamora's demands would have been in excess of the accommodation contemplated by Congress and would have constituted an undue hardship.

16. The Court cannot impose serious restrictions upon the operation of a business where the lives and property of citizens may be at stake. See *Harper v. Mayor and City Council of Baltimore*, 359 F. Supp. 1187, 1205 (D. Md. 1973).

17. Since a reasonable accommodation to his religious beliefs was made by the City under the Fire Department Regulations, and since any further accommodation would have caused undue hardship to the business of the Fire Department. Salomon Zamora was not discharged because of his religion as defined in 42 U.S.C. § 2000e(j). Zamora's discharge was not in violation of Title VII, Civil Rights Act of 1964, as amended.

Accordingly, the complaint is dismissed with prejudice.

It is so ordered.

Dated:

EDMUND PALMIERI
U. S. D. J.

APPENDIX C

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 75–1557

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

CITY OF ALBUQUERQUE, ET AL.,
DEFENDANTS-APPELLEES.

NOVEMBER TERM, NOVEMBER 29, 1976

ORDER

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico and was argued by counsel upon consideration whereof it is ordered that the judgment of that court is affirmed.

Supreme Court, U. S.
FILED
APR 12 1977
MICHAEL RODAK, JR., CLERK

No. 76-1191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, *Petitioner*

v.

CITY OF ALBUQUERQUE, ET AL, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 8, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1191

UNITED STATES OF AMERICA, *Petitioner*

v.

CITY OF ALBUQUERQUE, ET AL, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question presented as stated by the United States in its Petition is:

> "Whether an employer's duty, under Title VII of the Civil Rights Act of 1964, as amended, reasonably to accommodate an employee's bona fide religious practice of refraining from work on his Sabbath requires the employer to provide reasonable assistance to the employee in finding a substitute to work on his Sabbath."

Respondent, City of Albuquerque, does not believe that this question can properly be reviewed by this Court. *See* Reasons for Not Granting the Writ below.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Civil Rights Act of 1964 (78 Stat. 253, as amended, 42 U.S.C. Sec. 2000e, *et seq.*) and the regulations involved (29 C.F.R. 1605.1) are set forth in the Petition at pp. 2-3.

STATEMENT

The statement made in the Petition is generally sufficient. However, the Preliminary Statement found in the decision of the trial court below is more complete (*See* Petition App. B, pp. 14A-21A). It should also be noted that the decision in *Hardison v. Trans World Airlines*, 375 F.Supp. 877, reversed, 527 F.2d 33, certiorari granted, November 15, 1976, No. 75-1126, was only one of the many cases cited by Federal District Judge Palmieri in his Opinion. (Petition App. B pp. 34A, 36A-39A). Further, it is abundantly clear that the

Tenth Circuit was aware of *Hardison's* reversal and the granting of certiorari by this Court. (Petition App. A pp. 12A-13A).

REASONS FOR NOT GRANTING THE WRIT

1. The United States has petitioned for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. The "Question Presented" by the United States for review by this Court was not addressed by the Tenth Circuit. The United States asks whether Title VII of the Civil Rights Act of 1964 "requires the employer to provide reasonable assistance to the employee in finding a substitute to work on his Sabbath." The trial court made no findings or conclusions specifically referring to assistance in obtaining a substitute to work the Sabbath shifts. On the contrary, the only specific examples of further accommodation cited are:

a) a permanent switch in shifts (Conclusion 11)

b) a blanket grant of Sabbaths off (Conclusion 12)

c) substitution of Sunday duty for Sabbath shifts (Conclusion 12).

The Tenth Circuit in affirming the findings and conclusions made by the lower Court carefully framed the issue before it:

> "Did the City of Albuquerque and its fire department demonstrate that they had, through their rules and regulations, made reasonable efforts to accommodate Zamora's religious practices and that further accommodation would result in undue hardship? The trial

court found and concluded that such had been 'convincingly demonstrated.' We think such finds support in the record."

United States v. City of Albuquerque, 545 F.2d 110, 113 (1976).

This Court cannot review a question which has not yet been considered by the District Court or the Court of Appeals. *Neely v. Eby Construction Co.*, 386 U.S. 317, 330; *Tyrrell v. District of Columbia*, 243 U.S. 1, 2.

2. The United States, in its Petition, asserts that there is a conflict among the circuits on the question presented. If this Court feels that the question presented herein was properly raised below, Respondent believes that any conflict among circuits on this question is more transparent than real.

The United States contends that there is conflict in the circuits by treating the questions of "reasonable accommodation" and "undue hardship" as the same issue, when, in fact, if the accommodation is found reasonable, the "undue hardship" test is never properly reached. *Ward v. Allegheny Ludlum Steel Corporation*, 397 F. Supp. 375, 377 (1975); *Shaffield v. Northrup Worldwide Aircraft Services, Inc.*, 373 F.Supp. 937, 941 (1974); *Claybaugh v. Pacific Northwest Bell Telephone Co.*, 355 F.Supp. 1, 6 (1973).

The United States relies heavily on the fact that the trial court below noted that the factual situation in *Hardison v. Trans World Airlines*, 375 F.Supp. 877 (W.D. Mo. 1974) was similar to the case at bar and that that opinion was subsequently reversed by the Eighth Circuit. *Hardison v. Trans World Airlines*, 527 F.2d 33 (9th Cir. 1975). What the United States fails to recognize is that the trial court below

was addressing the question of what situations create an "undue hardship" under the language of the statute involved and not the question presented herein relating to what constitutes a "reasonable accommodation." Unlike the case at bar, in *Hardison, supra*, the employer contended that it was precluded from making *any* accommodation by the terms of a bona fide collective bargaining agreement.

The United States also points to the decisions in *Cummins v. Parker Seal Co.*, 516 F.2d 544, affirmed by an equally divided Court, No. 75-478, November 2, 1976 and *Riley v. Bendix Corp.*, 464 F.2d 1113 (5th Cir. 1972) as conflicting with the case at bar. Similarly, a close look at the facts of *Cummins, supra*, and *Riley, supra*, indicates that the employer, in both cases, ultimately took the position that *no* reasonable accommodation was possible without imposing "undue hardship" on the business. These cases should be distinguished from the instant case in that the City of Albuquerque did not take such a position. Rather, the City attempted to make a reasonable accommodation of Zamora's religious beliefs through its Fire Department regulations.

3. The United States has requested that action on the Petition be deferred pending this Court's decision in *Hardison*. The United States claims that *Hardison* may be controlling over any decision by this Court in this case. Respondent, City of Albuquerque, requests that the instant Petition be acted upon independently of any action in *Hardison* for the following reasons:

a) *Hardison* involves a private employer rather than a governmental entity, and

b) the question presented by the United States for review in this case is not presented in *Hardison*.

The United States raises the significant factual difference between this case and *Hardison*. In its Reasons for Granting the Writ, the United States points out that *Hardison* involves a private employer whereas this case involves a governmental entity. The City of Albuquerque is in agreement with the conclusion of the United States that:

> "Because of this additional dimension in the present case, the Court's decision in *Hardison* may not be controlling here."

Respondent would only strengthen this statement to assert that *Hardison cannot* be controlling because of this factual difference.

It does not appear to Respondent that the questions presented for review on Writ of Certiorari in *Hardison* would have any bearing on the question for which review is sought here. Although the Petition for Writ of Certiorari filed in *Hardison* was not available to Respondent, a summary of the Petition at 45 U.S.L.W. 3051 listed the following as questions presented:

> "Questions presented: (1) Must employer, under 1964 Civil Rights Act and Establishment Clause of First Amendment, accommodate employee's religious practices even if it has to deprive, without union consent, more senior employees of their seniority rights under bona fide collective bargaining agreement and even if it has to pay overtime wages to replacement or deprive other work areas of coverage? (2) Did court of appeals improperly preclude employer with large labor force from demonstrating inability to reasonably accommodate without undue hardship religious practices of its employees? (3) Did court of appeals fail to follow Fed. R.Civ.P. 52(a) in holding district court's findings clearly erroneous and in effect trying matter de novo?"

The facts here do not involve any collective bargaining agreement. The Tenth Circuit affirmed the trial court's conclusion that the employer had demonstrated undue hardship in connection with any further accommodation. No question has been raised about the procedure followed by the Court of Appeals.

It therefore does not appear to Respondent that this Court's decision in *Hardison* will consider the issue raised here by the United States. There is clearly no reason to defer action here pending the *Hardison* decision. This Petition should be decided by the Court on its own merit, without undue delay.

4. After review of the case law on the issues of "reasonable accommodation" and "undue hardship," the City of Albuquerque submits that the Tenth Circuit was correct in its conclusion that:

> "A reading of all these cases leads us to conclude that to a very great degree each case turns on its own particular facts and circumstances." 545 F.2d 110, 115

The question posed for review by Petitioner could apply only in those cases where the factual situation was such that finding a substitute to work on the Sabbath was a real possibility. The precedential value of an answer to this question is limited.

Given the narrow scope of the question, and the number of petitions for Writs of Certiorari presented to this Court, the City of Albuquerque respectfully submits that granting the requested Writ would be an unnecessary and injudicious use of the Court's time and energy. If there is in fact a conflict among the Circuits in the area of "reasonable ac-

commodation'' and ''undue hardship,'' this case is not the appropriate vehicle for its resolution.

CONCLUSION

The Petition for Writ of Certiorari should be denied without deferral.

Respectfully submitted,

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April, 1977

Supreme Court, U. S.
FILED
APR 14 1977
MICHAEL RODAK, JR., CLERK

No. 76-1191

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF ALBUQUERQUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF ALBUQUERQUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In the petition for a writ of certiorari, the United States stated the question presented in this case to be:

> Whether an employer's duty, under Title VII of the Civil Rights Act of 1964, as amended, reasonably to accommodate an employee's bona fide religious practice of refraining from work on his Sabbath requires the employer to provide reasonable assistance to the employee in finding a substitute to work on his Sabbath.

In their brief in opposition to the petition, respondents contend that this question cannot properly be reviewed by this Court. Respondents state that neither court below addressed this question, and that "[t]his Court cannot review a question which has not yet been considered

by the District Court or the Court of Appeals" (Br. in Opp. 4; citations omitted).

Throughout this lawsuit, the United States has consistently contended that Title VII imposed upon respondents an obligation to provide reasonable assistance to Mr. Zamora in finding a substitute to work on his Sabbath. For example, the United States charged in the complaint that respondents violated Mr. Zamora's Title VII rights by, *inter alia*, "requiring him to * * * find replacement workers in order * * * to observe his Sabbath * * * " (Complaint 2). In its district court "Brief In Support of Plaintiff's Proposed Findings of Fact and Conclusions of Law," the United States asserted that "the cases are clear that it was Chief Kuhn's responsibility and not Zamora's to obtain the cooperation of other employees in whatever accommodation was to be made" (Br. in Support 22). The United States similarly contended in its brief filed with the court of appeals that "[t]he district court's ruling * * * is inconsistent with * * * those cases indicating that the obligation to provide substitute workers is upon the employer, not the employee" (Br. 25; citations omitted).

Respondents correctly state that neither the opinion of the district court nor that of the court of appeals addressed the question of who is to bear the burden of arranging for substitute workers for Sabbatarians. By ruling against the United States without addressing the government's contention on this point, the courts below have necessarily rejected it, and the question, therefore, is properly presented here.

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, consideration of the petition should be deferred pending this Court's decision in *Hardison* v. *Trans World Airlines, Inc.*, No. 75-1126.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.